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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-857

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

and

YESHIVA UNIVERSITY FACULTY ASSOCIATION,

Intervenor-Petitioner,

v.

YESHIVA UNIVERSITY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

SAUL G. KRAMER
300 Park Avenue
New York, New York 10022
Counsel for Respondent
Yeshiva University

Of Counsel:

GERALD A. BODNER
1300 Morris Park Avenue
Bronx, New York 10461

PETER G. SAMUELS
MARK L. GOLDSTEIN
PROSKAUER ROSE GOETZ & MENDELSOHN
300 Park Avenue
New York, New York 10022

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement of the Case	2
REASONS FOR DENYING THE WRIT:	
I. The Opinion of the Second Circuit Gave Full Consideration to the Issues Presented and Decided Them Correctly	12
II. This Court Should Not Grant Certiorari to Review Evidence or to Discuss Specific Facts	18
III. No Conflict Exists Between Decisions of Courts of Appeals	20
IV. Granting the Petition for Certiorari Would Be Harmful to the Effective Administration of Justice	21
CONCLUSION	24

TABLE OF AUTHORITIES

Cases

American Oil Co., 155 N.L.R.B. 46 (1965)	5
Arizona Public Service Co. v. *NLRB*, 453 F.2d 228 (9th Cir. 1971)	14, 16
Boston University v. *NLRB*, 575 F.2d 301 (1st Cir. 1978), *petition for cert. pending*, No. 78-67	20
Claremont Colleges, 198 N.L.R.B. 811 (1972)	5
Deaton Truck Line, Inc. v. *NLRB*, 337 F.2d 697 (5th Cir. 1964), *cert. denied*, 381 U.S. 903 (1965)	15
GAF Corp. v. *NLRB*, 524 F.2d 492 (5th Cir. 1975)	13

PAGE

General Dynamics Corp., 213 N.L.R.B. 851 (1974) .. 5

General Telephone Co. of Michigan, 112 N.L.R.B. 46 (1955) 18

Magnum Import Co. v. *Coty*, 262 U.S. 159 (1923) ... 23

NLRB v. *Bell Aerospace Co., Div. of Textron, Inc.*, 416 U.S. 267 (1974) 5, 12, 16, 17

NLRB v. *Detroit Edison Co.*, 537 F.2d 239 (6th Cir. 1976) 14

NLRB v. *Esquire, Inc.*, 222 F.2d 253 (7th Cir. 1955) 14

NLRB v. *Gray Line Tours, Inc.*, 461 F.2d 763 (9th Cir. 1972) 14, 16

NLRB v. *Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965) 23

NLRB v. *Metropolitan Life Insurance Co.*, 405 F.2d 1169 (2d Cir. 1968) 14, 16

NLRB v. *Metropolitan Petroleum Co.*, 506 F.2d 616 (1st Cir. 1974) 14

NLRB v. *Pilot Freight Carriers, Inc.*, 558 F.2d 205 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978) 14

NLRB v. *Scott Paper Co.*, 440 F.2d 625 (1st Cir. 1971) 15

NLRB v. *Wentworth Institute*, 515 F.2d 550 (1st Cir. 1975) 12

Ohio Power Co. v. *NLRB*, 176 F.2d 385 (6th Cir.), *cert. denied*, 338 U.S. 899 (1949) 16

Pittsburgh Plate Glass Co., 115 N.L.R.B. 976 (1956) 18

Puget Sound Power & Light Co., 117 N.L.R.B. 1825 (1957) 5

Retail Clerks International Association v. *NLRB*, 366 F.2d 642 (D.C. Cir. 1966) (Burger, J.), *cert. denied*, 386 U.S. 1017 (1967) 17

Transformer Engineers, 114 N.L.R.B. 1325 (1955) .. 18

Turner's Express, Inc. v. *NLRB*, 456 F.2d 289 (4th Cir. 1972) 14

United States v. *Johnston*, 268 U.S. 220 (1925) 19

PAGE

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951) 13, 18, 19

University of Chicago Library, 205 N.L.R.B. 220 (1973), *enforced*, 506 F.2d 1402 (7th Cir. 1974) 5

Westinghouse Electric Corp., 163 N.L.R.B. 723 (1967) 5

Statutes

National Labor Relations Act, 29 U.S.C. § 151 *et seq.*:

Section 2(3), 29 U.S.C. § 152(3) 15

Section 2(11), 29 U.S.C. § 152(11) 5, 10, 14, 15, 16

Section 2(12), 29 U.S.C. § 152(12) 5

Miscellaneous

Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication*, 21 U.C.L.A. L. Rev. 63 (1973) 13

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RESPONDENT'S BRIEF IN OPPOSITION

Opinions Below

The unanimous decision of the Court of Appeals appears at pages 1a-42a of the appendix to the petition and is reported at 582 F.2d 686. The decision and order of the National Labor Relations Board (the "Board") appear at pages 45a-62a of the appendix to the petition and are reported at 231 N.L.R.B. No. 98. Its decision and direc-

tion of election in the underlying representation proceeding appear at pages 63a-79a of the appendix to the petition and are reported at 221 N.L.R.B. 1053.

Jurisdiction

The judgment of the Court of Appeals was entered on July 31, 1978. On October 18, 1978, the time for filing a petition for a writ of certiorari was extended by order of this Court to November 28, 1978. On December 4, 1978, the time for filing a response to the petition was similarly extended to January 18, 1979. The petition states that jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented

Whether the Second Circuit correctly concluded that the full-time faculty of respondent Yeshiva University ("Yeshiva") are supervisors and/or managerial personnel under the National Labor Relations Act, as amended, (29 U.S.C. § 151 *et seq.*) and, therefore, were improperly included in the bargaining unit found appropriate by the Board.

Statutes Involved

The relevant statutory provisions are set forth at pages 80a-82a of the appendix to the petition.

Statement of the Case

On July 31, 1978, the Second Circuit denied enforcement of the Board's order of August 24, 1977, requiring respondent Yeshiva to recognize the Yeshiva University Faculty Association as the exclusive bargaining agent of a unit of Yeshiva's full-time faculty members.[1] After reviewing the structure of Yeshiva (a unique university under orthodox Jewish auspices that combines a broad gamut of secular learning and Jewish and Hebraic studies in several different schools) and the role played by the faculty in its operation and governance, the Second Circuit concluded that the supervisory and managerial authority of the faculty "is so pervasive and consistently exercised" that the full-time faculty could not properly be included as employees in the bargaining unit. *NLRB* v. *Yeshiva University*, 582 F.2d 686, 695 n. 10 (2d Cir. 1978). Finding that the record compels the exclusion of the full-time Yeshiva faculty from the bargaining unit, the Second Circuit explained that

> "the Board here has made no factual findings which would preclude supervisory or managerial status, nor has the Board advanced any persuasive rationale for refusing to so categorize Yeshiva's faculty." (*Id.* at 702.)

The Court of Appeals concluded that despite the extensive and largely uncontroverted record, accumulated over twenty-one days of hearings, including over 4600 pages of testimony and 200 exhibits, and setting forth the unique character of Yeshiva and the distinctive system of shared authority by which this University is governed, the Board rendered its decision "without any analysis" of the facts before it and merely "treated the issue summarily." *Id.* at 696.

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[1] Yeshiva is a private, non-profit institution of higher education chartered under the laws of the State of New York. Yeshiva has offices and educational facilities located on four widely-separated campuses in New York City. At issue in this proceeding were 209 full-time and 150 part-time faculty members who teach 2,500 full- and part-time students. The Board proceeding excluded various other schools of the University and their faculties.

Hearings before the Board were conducted over a period of more than five months, between November 26, 1974 and May 6, 1975. *Id.* at 689. The great bulk of testimony and exhibits was directed specifically to whether the full-time faculty of Yeshiva are supervisors and/or managerial personnel. Nevertheless, despite the University's presentation of an enormous amount of uncontroverted evidence on this question, the Board saw fit to write only one conclusory paragraph on that key issue without referring to a single supporting fact. Speaking for a unanimous Court of Appeals panel, Judge Mulligan wrote:

> "[W]ithout any analysis the Board found that Yeshiva's full-time faculty were neither supervisors nor managerial personnel simply by stating that the substantial authority of the faculty was wielded in their capacity as professionals and by invoking three doctrines promulgated in earlier Board rulings. . . . [W]e are unpersuaded that these four justifications for the Board's decision on this point withstand careful scrutiny. . . ." (*Id.* at 696-97.)

In short, the Court of Appeals had carefully to review the record of this case because the Board abdicated its responsibility to provide an evidentiary rationale, and simply ignored in its summary decision the uncontroverted evidence demonstrating unequivocally the shared authority that the full-time faculty of Yeshiva exercise along with the administration in the operation and governance of the University. And upon undertaking such a review, the court found that the evidence

> "strongly supports the contention of Yeshiva that its full-time faculty, acting at times through committees or department chairmen, and at other times as a body, exercise supervisory and managerial functions as defined by section 2(11) of the Act and within the Board's prior holdings as discussed in *NLRB* v. *Bell Aerospace Co., Division of Textron, Inc.*" (*Id.* at 696.)

The Board had found that because the faculty of Yeshiva are professional employees they must be included in an appropriate bargaining unit.[2] But the Court of Appeals recognized that such reasoning begged the real issue. Yeshiva never argued that its full-time faculty members were not professional within the statutory definition of that term; it did argue that they share in the management of the institution to the extent that they must be excluded from the unit as managers and supervisors under any traditional analysis. *Id.* at 697. The Court of Appeals concluded, "the fact that employees are professional does not preclude them from also being categorized as supervisory or managerial employees ineligible for inclusion in a bargaining unit." *Id.* at 697, citing in support the Board's own decisions in *General Dynamics Corp.*, 213 N.L.R.B. 851, 860, 862, 863 (1974); *University of Chicago Library*, 205 N.L.R.B. 220 (1973), *enforced*, 506 F.2d 1402 (7th Cir. 1974); *Claremont Colleges*, 198 N.L.R.B. 811 (1972); *Westinghouse Electric Corp.*, 163 N.L.R.B. 723, 726 (1967); *American Oil Co.*, 155 N.L.R.B. 46, 48, 49 (1965); *Puget Sound Power & Light Co.*, 117 N.L.R.B. 1825, 1827 (1957).

The real issue, noted the Court of Appeals, concerned the "extensive control" of Yeshiva's faculty over the hiring, rank, salary, and tenure status of other faculty members, as well as what courses are to be taught, who should teach them, and the number of teaching hours to be

[2] Under Section 2(12) of the Act, 29 U.S.C. § 152(12), a professional employee is included within the Act's coverage despite the fact that in the performance of his work he must exercise discretion and judgment.

required of the faculty. The court was further concerned by the crucial role of the full-time faculty in determining the curriculum, admissions and graduation requirements, tuition, and in one instance, even the situs of a school. *Id.* at 698.

In rendering its decision, the Court of Appeals did what the Board had failed to do; that is, it analyzed the management of the institution on a detailed school-by-school basis. Thus, the court found that at Stern College a Committee on Academic Standards, composed of the Dean of the College, Dean Mirsky, who retains his faculty rank, and six full-time faculty, "fixes" the academic requirements and "decides" whether a student whose performance is inadequate will be required to leave the school. Although the decision to dismiss a student results in a loss of tuition income, the Court of Appeals noted that Dean Mirsky had never overruled the Committee. In addition, faculty-dominated committees at Stern "establish" admission standards, "determine" graduation requirements, and "set up" grading systems. On one occasion, the Dean was required to re-institute a major when the faculty disagreed with his decision to delete it. *Id.* at 690-91.

The record also demonstrated the determinative role played by faculty in the hiring, promotion, and termination of other faculty, and in the granting of tenure. The court noted that Dean Mirsky had always accepted the decisions of the faculty Promotions Committee, and the University President had never overruled a negative recommendation of that faculty committee. Dean Mirsky had never made a faculty appointment which was not approved by a department chairman. Similarly effective recommendations were made by department chairmen regarding faculty termination and tenure. In fact, tenure had been granted even when the Dean disagreed with a chairman's positive tenure recommendation. *Id.* at 691.

At Yeshiva College, a College Senate composed of faculty, administrators, students and alumni members has jurisdiction over admissions policy, scholastic standards, the grading system, and other policy matters. The court's review of the record showed that all measures passed by the Senate are subject to veto by the Faculty Assembly. The Dean of Yeshiva College, Dean Bacon, who is also a professor, testified before the Board that he felt "compelled" to see that decisions of the Senate and Assembly are executed. Not once in Bacon's sixteen years as Dean had the University President vetoed an action by either body. Hiring decisions, moreover, were jointly made by the Dean and the relevant department chairman (senior professor), with the Dean never appointing a faculty member over the objection of a chairman. All promotion recommendations made by the chairmen's Advisory Council, whether positive or negative, had been put into effect, even when the Dean had opposed the Council's recommendations. Finally, the record showed that senior professors largely determine the budget of their subject area. *Id.* at 691.

At the Erna Michael College of Hebraic Studies, admissions procedure, curricular matters, grading, scheduling, and other questions of policy are subjects on which the faculty, through the faculty meeting, "governs". Dean Rabinowitz testified before the Board that he felt "bound" to institute even those faculty decisions with which he disagreed, such as the establishment of a trimester academic calendar. *Id.* at 692. Neither Dean Rabinowitz nor any other member of the administration had ever vetoed a decision of the faculty on such issues, the Dean testifying that his role was "simply [to] carry out the mandate of the faculty." *Id.* at 700, n. 17.

Before concluding that the full-time Yeshiva faculty played an instrumental role in the operation and governance of the various academic units of the University and, therefore, must be excluded from the bargaining unit, the Second Circuit noted numerous additional circumstances from the record. For instance, the Director of James Striar School of General Jewish Studies, who himself carries a full-time teaching load, had testified that faculty meetings are "in a great sense decisive as to the direction of the school," *id.* at 692, and that he did not recall ever overruling a direct recommendation of the faculty. He also testified that on one occasion a majority of the faculty rejected his recommendation to retain a student guidance procedure, thereby "overruling" him on the issue. *Id.*

The Director of the Yeshiva Program testified that all decisions affecting academic matters were made by a consensus of the faculty. In one instance, the faculty decided to extend the academic calendar by two weeks and this decision was implemented. *Id.* at 692.

The faculty of the Belfer Graduate School, the Second Circuit noted, make all decisions regarding faculty hiring, promotion, tenure and termination. The record reveals that Arthur Komar became Belfer's Dean in 1968 after the faculty successfully petitioned the President of the University for the removal of Komar's predecessor. Thereafter, Komar was elected Acting Dean by the faculty and he obtained a vote of approval from the faculty before accepting a permanent appointment as Dean. Komar testified that he viewed his position as Dean as "first among equals." He further stated that his only role in hiring is his participation—like any other faculty member—in the discussion and voting on applicants to his department. *Id.* at 693.

At Ferkauf, as at Belfer, faculty hiring decisions are made by consensus of the department. Faculty promotions and tenure decisions at Ferkauf are determined by faculty committees. Moreover, department chairmen at Ferkauf wield substantial budgetary power. For example, tuition increases are never recommended by the Dean unless the chairmen concur. Chairmen also establish, in consultation with their departments, the workload of the full-time faculty. *Id.* at 693.

The Acting Dean at Wurzweiler testified that the faculty had the authority to determine the school's "labor policy," by promulgating guidelines which are binding on him governing the school's hiring, promotion, tenure and termination policies. He testified that in addition to wielding great power on academic matters, the faculty had made decisions with "serious budgetary consequences." The uncontroverted evidence in the record reveals that faculty committees played a prominent role in the running of Wurzweiler. *Id.* at 693-94.

At the Bernard Revel School, decisions on curriculum, admissions requirements, degree requirements, and course offerings are all made by consensus of the faculty. Department chairmen make effective recommendations regarding both full- and part-time hiring. In fact, chairmen's negative recommendations in this area have always been upheld. *Id.* at 694.

Upon review of this record, the Court of Appeals concluded that

> "When faculty members have such power—as the record indicates they do at Yeshiva—they no longer are simply exercising individual professional expertise. They are, in effect, substantially and pervasively operating the enterprise." (*Id.* at 698.)

The Court of Appeals also rejected the Board's position that since the faculty's supervisory and managerial functions are exercised "on a collective basis" rather than by individual faculty members, they must be denied status as supervisory or managerial personnel. The court found that "[t]he Board's rationale is not adequately explained in this or in its prior opinions." *Id.* at 698. In a footnote, the court explained:

> "When the Board first announced this view in *C.W. Post Center of Long Island University, supra,* at 905, it did so without benefit of analysis, and without citation to pertinent administrative decisions, judicial precedents or legislative history. In *Fordham University, supra,* the Board repeated its conclusory approach to the problem. Finally, in *Adelphi University, supra,* the Board conceded that its position arose not from precedent but from its puzzlement in attempting to apply to the unique university governance structure terms which were "designed to cope in the typical organizations of the commercial world." *Id.* at 648. The Board admitted that it could not square the Act with the university setting in which "power and authority is vested in a body composed of all of one's peers or colleagues." *Id.* See Kahn, *supra,* at 95, 120-25. In two subsequent decisions, *Northeastern University, supra,* and *Miami University, supra,* the Board refused to further analyze or reconsider the issue of the supervisory or managerial status of full-time faculty. Instead, it dismissed the question, as it did in this case, solely by reference to its earlier rulings." (*Id.* at 698-99, n. 14.)

Pointing to the inconsistent interpretation of Section 2(11) of the Act by the Board, the lack of legislative authority and citable precedent for the "collective authority" approach taken by the Board, and the clear lack of logic in

the Board's reasoning on this point, the court concluded that "the Board has advanced no satisfactory rationale for the weight it has given this factor." *Id.* at 699-700.

The Board denied managerial or supervisory status to the full-time faculty of Yeshiva on the additional ground that the faculty is alleged to be acting on its own behalf and not on behalf of Yeshiva, its employer. The Court of Appeals found that "[t]he record in no way supports this proposition. . . ." *Id.* at 700. Its review of the record made it evident that

> "The full-time faculty as a whole or through committees have not in fact acted simply in an advisory capacity, nor have they merely made recommendations which were accorded substantial weight; their decisions on major policy issues have, for the most part, proved definitive." (*Id.* at 700.)

The court further admonished the Board that *this record* establishes no significant divergence between the interests of the faculty and those of the administration or the Board of Trustees. *Id.* at 701.

Finally, the Second Circuit commented that although none of the criteria applied by the Board and so far discussed had any particular appeal, the concept that the faculty have neither managerial nor supervisory status because they are subject to the ultimate authority of the Board of Trustees is "particularly unconvincing." *Id.* at 701. Every corporation is ultimately operated by its Board of Directors, the court noted, yet that fact has never precluded a finding that there are managerial or supervisory employees in the corporation. *Id.* at 701. Again, the court noted the necessity to scrutinize *this* record: "Of course, it may well be that at other institutions the Boards of Trustees have in fact regularly reviewed and rejected faculty recommendations, but this is not the case at Yeshiva." *Id.* at 702.

The opinion of the Second Circuit emphasizes that each case must rest on its own facts. The court found that the Board, while espousing flexibility in faculty status cases, ignored the facts of this case and instead summarily applied "rigid criteria" carried over from previous decisions. *Id.* at 703. Upon review of *this* record, the Court of Appeals decided that "the facts compel the conclusion under long established standards" that the full-time faculty of Yeshiva must be excluded from the bargaining unit and that "the Board is not now free 'to read a new and more restrictive meaning into the Act.'" *Id.* at 703, quoting *NLRB* v. *Bell Aerospace Co., Div. of Textron, Inc.*, 416 U.S. 267, 289 (1974).

REASONS FOR DENYING THE WRIT

I. The Opinion of the Second Circuit Gave Full Consideration to the Issues Presented and Decided Them Correctly.

We are here concerned with the record in *this* case and no other. Courts and administrative agencies do not sit to contemplate hypothetical cases but to decide real ones. Indeed, the Second Circuit was cognizant of this limitation, saying:

> "We stress that our function is not to examine *in vacuo* the governance procedures of all four-year private institutions of learning described in the briefs of the *amici* universities as "mature" institutions of higher education. . . . Given the great diversity in governance structure and allocation of power at such universities it is appropriate to address ourselves solely to the situation at the institution involved in this proceeding. *NLRB* v. *Wentworth Institute*, 515 F.2d 550, 556 (1st Cir. 1975)." (*Id.* at 696.)

This record shows, based on uncontroverted evidence before the Board, that a pervasive system of shared management and supervision exists at Yeshiva;[3] that the full-time faculty must be treated as supervisory and/or managerial personnel and, thus, excluded from the unit; and that the Second Circuit carefully applied the appropriate legal principles to the evidence presented to the Board.

Yeshiva has never argued that the faculty alone run the University. Rather, it has maintained that the faculty share with the administration the operation and governance of the University. That is what this record shows. And, that is what the Second Circuit has correctly concluded from its review of this record.

The Board failed to analyze the record and applied unjustified, arbitrary standards. Its conclusory findings have no basis in the record, and the opinion of the Second Circuit provides the only analysis of the evidence presented.[4]

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[3] *See* Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication*, 21 U.C.L.A. L. Rev. 63 (1973).

[4] In maintaining that Yeshiva faculty are not managerial or supervisory employees, the Board argues that deference is owed to its determinations in representation matters. The Court of Appeals, while expressly acknowledging the validity of this general principle (582 F.2d at 702) also recognized that no deference is owed where, as in this case, the Board's conclusory findings are not supported by "substantial evidence on the record as a whole" and do not have a "reasonable basis in law." *GAF Corp.* v. *NLRB*, 524 F.2d 492, 495 (5th Cir. 1975). This Court has instructed the courts of appeals to determine the substantiality of evidence supporting a Board decision *not* as a rubber stamp for Board conclusions but rather by taking into account "contradictory evidence or evidence from which conflicting inferences could be drawn." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 487 (1951). Moreover, the Board's discretion is particularly narrow in determining whether an employee is a super-

To correct the Board's summary application of general legal phrases in a manner totally inconsistent with the evidence, the Second Circuit reviewed the record and produced a unanimous opinion limited to the particular facts of this case. This is a one-of-a-kind record of how a unique university, the only one under Jewish auspices, is governed and operated. That record discloses that in many instances the full-time Yeshiva faculty "effectively recommend the hiring, promotion, salary and tenure of the faculty of the University in a manner which can hardly be described as routine or clerical." 582 F.2d at 696. That record discloses that the faculty "further perform managerial functions not only by their personnel decisions but by adopting the standards of admission, the curriculum, the grading system and the graduation requirements of their school." *Id.* at 696. And that record discloses that "in particular cases the hiring of deans, the physical location of a school, teaching loads, and even the tuition to be charged were controlled by the full-time faculty." *Id.* at 696.

Indeed, the Second Circuit noted that the ability of the full-time faculty effectively to recommend or exercise many of the powers enumerated in Section 2(11), and to formulate

visor for "[t]he Act describes supervisors in detail, and the Board can only find as a matter of fact that the individual falls within or without the statutory definition." *NLRB* v. *Esquire, Inc.*, 222 F.2d 253, 257 (7th Cir. 1955). As the cases show, the courts of appeals have not hesitated to vacate the Board's findings that particular employees lack supervisory and managerial status. *E.g., NLRB* v. *Pilot Freight Carriers, Inc.*, 558 F.2d 205 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978); *NLRB* v. *Detroit Edison Co.*, 537 F.2d 239 (6th Cir. 1976); *NLRB* v. *Metropolitan Petroleum Co.*, 506 F.2d 616 (1st Cir. 1974); *NLRB* v. *Gray Line Tours, Inc.*, 461 F.2d 763 (9th Cir. 1972); *Turner's Express, Inc.* v. *NLRB*, 456 F.2d 289 (4th Cir. 1972); *Arizona Public Service Co.* v. *NLRB*, 453 F.2d 228 (9th Cir. 1971); *NLRB* v. *Metropolitan Life Insurance Co.*, 405 F.2d 1169 (2d Cir. 1968).

and effectuate University policy, was not even disputed.[5] *Id.* at 696.

The Second Circuit applied long-established principles to the record evidence in concluding that the Yeshiva faculty are supervisors and/or managerial personnel. The definition of "employee" in Section 2(3) of the Act, 29 U.S.C. § 152(3), excludes any individual employed as a "supervisor." Section 2(11), 29 U.S.C. § 152(11), defines a "supervisor" as follows:

> "The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or to effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

[5] That the administration and Board of Trustees of Yeshiva have so rarely interfered with the faculty's running of the various schools is explained by the fact that the interests of the faculty and of the University are almost always coextensive. Thus, the Court of Appeals correctly stated:

> "Whatever the situation may be in other institutions, the record here establishes no significant divergence between the interests of the faculty and those of the administration or the Board of Trustees. On the contrary, the faculty has initiated, and the administration has repeatedly accepted, major policy determinations which constitute the essence of the University's educational venture."

NLRB v. *Yeshiva University*, 582 F.2d 686, 701 (2d Cir. 1978); *cf. NLRB* v. *Scott Paper Co.*, 440 F.2d 625, 630 (1st Cir. 1971) (court rejected Board's argument, that tractor owner-operators were not supervisors because authority not exercised in interest of employer company, on ground that interests "were so intertwined that powers were exercised for both."); *Deaton Truck Line, Inc.* v. *NLRB*, 337 F.2d 697 (5th Cir. 1964), *cert. denied*, 381 U.S. 903 (1965) (supervisory authority may be exercised in the interest of *both* the employer and employees).

It is well-settled that possession of any one of the enumerated powers in Section 2(11) or the power effectively to recommend with respect to any one of them is sufficient to satisfy the statutory definition of a supervisor. *E.g., NLRB* v. *Metropolitan Life Insurance Co.,* 405 F.2d 1169, 1177 (2d Cir. 1968); *Ohio Power Co.* v. *NLRB,* 176 F.2d 385 (6th Cir.), *cert. denied,* 338 U.S. 899 (1949).

It has also been uniformly held that it is the *possession* of supervisory authority, and not the actual exercise of that authority, that is determinative. Thus, the Ninth Circuit, in *Arizona Public Service Co.* v. *NLRB,* 453 F.2d 228, 230 (9th Cir. 1971), has stated that: "[A]n employee who has the power to fire and hire other employees is nonetheless a supervisor though he has never exercised that power." *See also, NLRB* v. *Gray Line Tours, Inc.,* 461 F.2d 763, 764 (9th Cir. 1972) ("[E]xistence of supervisory authority rather than its exercise is determinative."); *Ohio Power Co.* v. *NLRB,* 176 F.2d 385, 388 (6th Cir.), *cert. denied,* 338 U.S. 899 (1949) ("Section 2(11) covers any individual having authority * * * responsibly to direct * * *. It does not require the exercise of the power described for all or any part of the employee's time. It is the existence of the power which determines the classification.") [6]

In *NLRB* v. *Bell Aerospace Co., Div. of Textron, Inc.,* 416 U.S. 267 (1974), this Court confirmed that, in addition to supervisors, *all* managerial employees must be excluded from coverage of the Act, not only those whose unionization

[6] Intervenor-petitioner would have this Court believe that the full-time faculty of Yeshiva are neither managerial nor supervisory personnel because they are professionals. To this end, intervenor-petitioner first concedes that Congress has rejected an opportunity to amend Section 2(11) of the Act to exclude certain health-care professionals from the definition of "supervisor," and then goes on to attempt to rationalize away this congressional decision by saying that it was really unnecessary for Congress to amend Section 2(11) in this manner because the Board had not considered these health-care professionals to be supervisors anyway. (Br., pp. 19-23). The point is, however, that Congress recognized that professionals can be supervisors and that the two classifications are not mutually exclusive. Whether professional people are also supervisors or managers depends upon the facts of each case. And, as the Second Circuit has concluded, the Board failed to analyze the factual circumstances of Yeshiva, which fully support respondent's contention that Yeshiva's full-time faculty exercise supervisory and managerial functions. 582 F.2d at 696.

might lead to conflicts of interest.[7] Employees who fall within this category include "those who formulate, determine, and effectuate an employer's policies." *Retail Clerks International Association* v. *NLRB,* 366 F.2d 642, 645 (D.C. Cir. 1966) (Burger, J.), *cert. denied,* 386 U.S. 1017 (1967). This Court concluded in *Textron* that the Board "'is not now free' to read a new and more restrictive meaning into the Act" by which certain managerial employees would be held to be within its coverage. *Id.* at 289. In the instant case, the Second Circuit simply applied this basic principle to the facts in the record. 582 F.2d at 703.[8]

[7] In that case, at 289, this Court emphasized the mandatory nature of the exclusion of all employees found to be managerial:

> "[T]he Board's early decisions, the purpose and legislative history of the Taft-Hartley Act of 1947, the Board's subsequent and consistent construction of the Act for more than two decades, and the decisions of the courts of appeals all point unmistakably to the conclusion that managerial employees are not covered by the Act."

[8] Intervenor-petitioner tells this Court that the Second Circuit was somehow in error because there is evidence that the University administration dealt with certain faculty welfare committees about salaries (Br., pp. 15-16). Obviously, managers and supervisors have salary concerns, just as do rank-and-file employees. That the administration dealt with those problems on occasion through faculty welfare committees does not render the affected faculty or the members of the committees non-managerial or non-supervisory. The argument begs the question.

The record evidence led the Second Circuit to the only proper decision—exclusion of the full-time Yeshiva faculty from the bargaining unit because of their supervisory and managerial authority.[9] To do otherwise would effectively excise those exclusions from the Act. As this Court has said,

> "Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds." *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 490 (1951).

II. This Court Should Not Grant Certiorari to Review Evidence or to Discuss Specific Facts.

Petitioner has advanced no valid basis for the grant of certiorari. Asserting neither a conflict in the circuits nor that the decision of the Second Circuit is in conflict with applicable decisions of this Court, petitioner is simply asking this Court to review evidence and discuss specific facts. But not every case merits Supreme Court review. This case certainly does not.

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[9] Indeed, much less authority than has been shown here has routinely led the NLRB to exclude persons in the industrial sector as managers and supervisors. For example, in *General Telephone Co. of Michigan,* 112 N.L.R.B. 46, 48-50 (1955), service assistants, who had "no authority to hire, discharge, assign, promote, or discipline employees," were held to be supervisors because their evaluations of operators were given "substantial weight" by chief operators. This was so even though the chief operators made "thorough investigation before disciplining operators or effecting changes in their status, and [were] in a position to form personal estimates of their qualifications." Similarly, in *Pittsburgh Plate Glass Co.,* 115 N.L.R.B. 976, 977 (1956), laboratory assistants were held to be supervisors merely because their hiring recommendations were given "effective weight" by management. And, in *Transformer Engineers,* 114 N.L.R.B. 1325, 1327 (1955), leadladies were excluded from the bargaining unit because foremen gave "great weight" to their opinions about employee performance.

The decision below is carefully restricted to the particular and unique facts of this case and, therefore, should affect few others than the litigants. This decision will not upset collective bargaining relationships at other universities because it is expressly limited to the situation at Yeshiva.

Nevertheless, the petitioner and the intervenor-petitioner ask this Court to scrutinize the extensive record to determine whether any facts exist which may be contrary to the opinion of the Court of Appeals. As Justice Holmes wrote in *United States* v. *Johnston,* 268 U.S. 220, 227 (1925): "We do not grant a certiorari to review evidence and discuss specific facts."

For many years, this Court has in these circumstances steadfastly refused to second-guess the appellate courts as to their review of the record before an administrative agency, such as the NLRB. Thus, this Court has stated:

> " 'Whether on the record as a whole there is substantial evidence to support agency findings is a question Congress has placed in the keeping of the Courts of Appeals. This Court will intervene *only* in what ought to be the rare instance when the standard appears to have been misapprehended or *grossly* misapplied.' " (Emphasis supplied.) *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 491 (1951).

Nothing in this case warrants deviation from this long-established principle.

III. No Conflict Exists Between Decisions of Courts of Appeals.

The decision of the Second Circuit is the only reported decision of an appellate court on the question upon which certiorari is being sought. *See NLRB* v. *Yeshiva University,* 582 F.2d 686, 695 n. 9 (1978). In fact, the Solicitor General has expressly told this Court, and we agree, that there is no conflict between the decision of the Second Circuit in *Yeshiva* and the decision of the First Circuit in *Boston University* v. *NLRB,* 575 F.2d 301 (1st Cir. 1978), *petition for cert. pending,* No. 78-67, the only other appellate decision which even touches on a similar issue and the case relied on by the intervenor-petitioner to argue that there is in fact a conflict. (Brief of the Solicitor General in *Boston University,* p. 17).

The Brief of the Solicitor General in Opposition to the Petition for Certiorari in the *Boston University* case dismisses all possible claim to a conflict among the circuits as follows:

> "In *Yeshiva,* the Second Circuit held that the entire full-time faculty of the university were supervisory or managerial employees. No such issue was raised here; indeed petitioner conceded throughout the instant proceeding that its full-time faculty constituted an appropriate bargaining unit, but contended that department chairmen should be excluded based on their alleged supervisory status. The Second Circuit in *Yeshiva* itself noted the limited scope of the instant decision." (Br., p. 17, n. 11).

Moreover, the Brief in Opposition filed by the Boston University Chapter, American Association of University Professors, argues forcefully that "the *Yeshiva* decision affords no basis for Court review of the instant [*Boston University*] case, since the issue on which it [*Yeshiva*] was decided has not been advanced here." (Br., pp. 8-9). And,

nothing in the brief in this case of the *amicus* American Association of University Professors even suggests the presence of a conflict.

This case concerns the particular nature of Yeshiva and the distinctive manner of its operation. No other court of appeals has been faced with the faculty status problems which exist at Yeshiva; therefore, no conflict exists.

IV. Granting the Petition for Certiorari Would Be Harmful to the Effective Administration of Justice.

The Solicitor General tells us, in essence, that the *Yeshiva* decision, if allowed to stand, would interfere with the effective administration of justice because it would unsettle the law established by the Board and cause other colleges and universities to pursue representation proceedings to determine the managerial and supervisory status of faculties at their institutions, rather than to consent to NLRB-conducted elections or to accept previously-issued certifications. (Br., pp. 16, 25-27). Obviously, subsequent litigation by other interested parties may follow a Court of Appeals decision of first impression, as is this case, albeit a decision limited to its facts. However, if this so-called threat were accepted as an adequate reason for granting certiorari, every Court of Appeals decision of first instance that materially disagrees with and reverses an agency's determinations would come "automatically" before this Court for review.[10]

In any event, in the particular circumstances present here, the effective administration of justice would be better served by a denial of certiorari.

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[10] Indeed, although several months have elapsed since the Court of Appeals issued its decision, neither of the petitioners nor the *amicus* (despite a demonstrated willingness to go outside the record) has cited to this Court a single example of the decision below having caused the termination of any existing collective bargaining relationship. This is not surprising, for not only is *Yeshiva* limited to its facts, but nothing in that decision precludes a private university from recognizing or bargaining with managerial personnel or makes it unlawful for such employees to seek to bargain or to maintain their unionized status.

At the root of the Court of Appeals decision in *Yeshiva* is the fact that the Board has been internally inconsistent in the administration of the Act with respect to questions of faculty status. The Court of Appeals noted that since the Act itself is silent as to its application to professional faculties in private institutions of higher learning "it would seem that an appropriate method to explore fully the special problems created by the Board's assumption of jurisdiction here would be by rule-making." *Id.* at 703.

In 1971, both the American Association of University Professors (which is an *amicus* here) and the Association of American Universities requested the Board to institute a rule-making proceeding to establish guidelines to be used in representation cases involving faculty members of colleges and universities. The Board denied that petition, citing the need for a flexible adjudicative approach by which it could explore and analyze in depth the facts of each case. *Id.* at 703.

The Board's denial of a rule-making proceeding is, indeed, curious because, as the Second Circuit concluded, since that denial "in its adjudicative process the Board has consistently applied . . . rigid criteria . . . ." *Id.* at 703. The opinion below demonstrates that the Board has not engaged in a case-by-case consideration of the facts. *Id.* at 696. Regardless of the record evidence, in *Yeshiva* and preceding university faculty-status representation cases, the Board has attempted to adopt an unbending rule which it simply reiterates in each decision.

What the Board did in this case was to sacrifice the proper administration of labor law under the Act to expediency, a process of "jurisprudence" by cryptic reference to previous Board rulings equally devoid of factual analysis and legal exegesis. After painstaking effort by Yeshiva to produce a complete record, the Board responded once again with "rigid criteria" carried over from its laconic earlier decisions and produced what can best be described as a mechanistic result that simply does not square with the record.[11]

In its brief, the Solicitor General now seeks to provide a cogent factual rationale for the Board's determination, something that is entirely lacking in its underlying representation decision. (Br., pp. 4-13). But the law, as stated by this Court, is that "courts may not accept appellate counsel's *post hoc* rationalizations for agency action . . . . For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review." *NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 444 (1965).

As Chief Justice Taft wrote in *Magnum Import Co.* v. *Coty*, 262 U.S. 159, 163 (1923):

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by

[11] We are not saying that the Board must provide a detailed analysis in every case that comes before it. Here, however, there has been no independent review of the more than 4600 pages of record or findings by an administrative law judge, as there would be in most unfair labor practice cases. Nor did the Board allow the underlying representation case to be decided in the first instance by the Regional Director, thus eschewing the need for a review of the record and a decision and determination at the local level, subject to review by the Board itself. Rather, the Board chose to decide the underlying representation case itself and did so in a way which the Second Circuit rejected as without factual or legal support.

> this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

Surely, this Court does not sit merely to give the defeated party before the Court of Appeals (even when it is the Government) another hearing and an opportunity to supply a "*post hoc* rationalization for agency action." And surely, this Court does not sit to find the facts that the Board was unwilling or unable to analyze. The Second Circuit has already sifted through the extensive record and has pointed out to the Board the error of its ways. There is no reason consistent with the effective administration of justice for this Court to repeat the task.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

SAUL G. KRAMER
Counsel for Respondent
Yeshiva University

Of Counsel:
GERALD A. BODNER
1300 Morris Park Avenue
Bronx, New York 10461

PETER G. SAMUELS
MARK L. GOLDSTEIN
PROSKAUER ROSE GOETZ & MENDELSOHN
300 Park Avenue
New York, New York 10022

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